

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

GREGORY W STEWART,) Case No.: 1:20-cv-01541-JLT (HC)
)
Petitioner,) ORDER DIRECTING CLERK OF COURT TO
) ASSIGN DISTRICT JUDGE
v.)
J. MACOMBER, Warden,) FINDINGS AND RECOMMENDATION TO
) DISMISS PETITION FOR LACK OF
Respondent.) JURISDICTION
)
) [TWENTY-ONE DAY OBJECTION DEADLINE]

On October 30, 2020, Petitioner filed the instant petition for writ of habeas corpus in this Court. Because the petition is successive, the Court will recommend it be DISMISSED.

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition “[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief.” Rule 4 of the Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,

1 constitutional right or 2) the factual basis of the claim was not previously discoverable through due
2 diligence, and these new facts establish by clear and convincing evidence that but for the constitutional
3 error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28
4 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or
5 successive petition meets these requirements.

6 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by this
7 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
8 order authorizing the district court to consider the application.” In other words, Petitioner must obtain
9 leave from the Ninth Circuit before he can file a second or successive petition in district court. See
10 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive
11 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district
12 court lacks subject-matter jurisdiction over a second or successive petition. Burton v. Stewart, 549
13 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

14 In this case, Petitioner challenges his 1994 conviction in the Merced County Superior Court for
15 sale of a controlled substance. He raises claims of juror misconduct, unconstitutional search and
16 seizure, ineffective assistance of counsel and insufficiency of the evidence. Petitioner previously
17 sought federal habeas relief in this Court with respect to the same conviction numerous times. See
18 Stewart v. McGrath, et al., No. 1:00-cv-05452-SMS (dismissed as untimely); Stewart v. Sullivan, No.
19 1:06-cv-01400-WMW (dismissed as successive); Stewart v. Adams, No. 1:09-cv-00685-GSA (same);
20 Stewart v. Adams, No. 1:09-cv-02212-JLT (same); Stewart v. Macomber, No. 1:10-cv-00954-AWI-
21 DLB (same); Stewart v. Macomber, et al., No. 1:11-00814-DLB (same); Stewart v. Macomber, No.
22 1:12-cv-00594-JLT (same); Stewart v. Macomber, No. 1:14-cv-00266-AWI-MJS (same); Stewart v.
23 Macomber, No. 1:15-cv-00051-SKO (same); Stewart v. Macomber, et al., No. 1:15-cv-01592-SMS
24 (same); Stewart v. Macomber, No. 1:16-cv-00948-EPG (same); Stewart v. Macomber, No. 1:16-cv-
25 01428-EPG (same); Stewart v. Macomber, No. 1:17-cv-00415-AWI-JLT (same); Stewart v.
26 Macomber, No. 1:17-cv-00683-SAB (same); Stewart v. Macomber, No. 1:17-cv-01100-EPG (same);
27 Stewart v. Macomber, et al., No. 1:17-cv-01420-LJO-EPG (same); Stewart v. Macomber, No. 1:18-cv-
28 00012-LJO-MJS (same); Stewart v. Macomber, No. 1:18-cv-00338-DAD-EPG (same); Stewart v.

1 Macomber, No. 1:18-cv-01588-AWI-JLT (same); Stewart v. Macomber, No. 1:19-cv-00370-AWI-
2 SKO (same); Stewart v. Macomber, No. 1:19-cv-00731-AWI-JDP (same); Stewart v. Macomber, No.
3 1:19-cv-01056-LJO-JLT (same); Stewart v. Macomber, No. 1:19-cv-01331-DAD-JDP (same); Stewart
4 v. Macomber, et al., No. 1:20-cv-00221-DAD-EPG (same); Stewart v. Macomber, No. 1:20-cv-00969-
5 DAD-SAB (same); Stewart v. Macomber, No. 1:20-cv-01323-DAD-JLT (same).¹

6 The Court finds that the instant petition is “second or successive” under 28 U.S.C. § 2244(b).
7 See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding “dismissal of a first habeas
8 petition for untimeliness presents a ‘permanent and incurable’ bar to federal review of the underlying
9 claims,” and thus renders subsequent petitions “second or successive”). Petitioner makes no showing
10 that he has obtained prior leave from the Ninth Circuit to file his successive petition. Therefore, this
11 Court has no jurisdiction to consider Petitioner’s renewed application for relief under 28 U.S.C. §
12 2254 and must dismiss the petition. See Burton, 549 U.S. at 157.

13 ORDER

14 Accordingly, the Court DIRECTS the Clerk of Court to assign a district judge to the case.

15 RECOMMENDATION

16 For the foregoing reasons, the Court RECOMMENDS that the petition be DISMISSED as
17 successive.

18 This Findings and Recommendation is submitted to the United States District Court Judge
19 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
20 Local Rules of Practice for the United States District Court, Eastern District of California. Within
21 twenty-one days after being served with a copy, Petitioner may file written objections with the Court.
22 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
23 Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. §
24 636 (b)(1)(C).

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28 ¹ The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

IT IS SO ORDERED.

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE